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Supreme Court, U. S.
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# Supreme Court of the United States

OCTOBER TERM, 1939

No. 236

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UNITED STATES OF AMERICA, for the Use and Benefit of MIDLAND LOAN FINANCE COMPANY, a Corporation,

*Petitioner (Plaintiff-Appellant below),*

vs.

NATIONAL SURETY CORPORATION, a Corporation, and PATRICK J. MALONE,

*Respondents (Defendants-Appellees below).*

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## REPLY TO PETITION FOR CERTIORARI.

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## REPLY TO PETITION FOR CERTIORARI.

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### I.

### MATTER OMITTED FROM PETITION.

The question presented is, when stripped, one of construction of a bond. It is a Post Office bond covering a postmaster, and the meaning of its proper language is illuminated by the statutes and regulations pursuant to which it was written. Petitioner claims that a mail user, not a party to it, may sue upon it without the consent of the United States,

the obligee, for consequential damages claimed to have followed misdelivery of petitioner's mail.

The portions of the Petition for Certiorari captioned "Condition of Bonds", "Statutes Involved" and "Regulations Violated by Postmaster" respectively, significantly, omit portions of the bond in question, some of the statutes involved, and those Postal Regulations under which the Postmaster acted, and those other Regulations providing an ample remedy after the United States shall have sued upon the bond of which it is the sole obligee. Since each of these things was considered by the lower courts in arriving at the decision which the Petition assails, fairness to those courts impels their quotation here.

*The bond* is set forth on page 19 of the record. In addition to the condition quoted on page 8 of the Petition herein, it names an obligee. The trial court considered this important (Record, pp. 74, 77, 87), as did the Circuit Court of Appeals (R., pp. 103, 105). The bond names its obligee in the following language:

> "* * * we * * * Malone * * * as principal * * * and National Surety Corporation * * * as sureties * * * do hereby bind ourselves * * * *to pay to the United States of America* the sum of Sixteen Thousand Dollars ($16,000.00) * * *." (Italics ours.)

*The statute* which the Circuit Court of Appeals deemed "pertinent" (R. p. 104), and which is omitted from the Petition herein is 28 U. S. C. A., Section 732, and reads as follows:

> "All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing

of vessels, or the internal revenue, or direct taxes, and *all suits arising under the postal laws, shall be brought in the name of the United States.*" (Italics ours.)

*The statutes,* in addition to those mentioned in the Petition, from which the trial court deduced a congressional intent and policy adverse to petitioner's contention (R. pp. 75, 76), are quoted by that court in the footnote on pages 75 and 76 of the Record.

*The Postal Regulation* under which this postmaster acted, part of which is mentioned on page 10 of the Petition herein, is further quoted in the opinion of the Circuit Court of Appeals (R. p. 104). The trial court thought that this postmaster was convinced that the second paragraph of this Regulation covered this case and justified his conduct (R. p. 72). The significant parts of the Regulation in question are:

"Sec. 777. Mail matter should be delivered to the person addressed or in accordance with his written order. When the addressee habitually sends for or receives his mail through his clerk, servant, agent, or some member of his family, and recognizes or acquiesces in such delivery, no written order need be required.

2. When a person requests delivery to him of the mail of another, claiming that the addressee has verbally given him authority to receive it, the postmaster, if he doubts the authority, may require it to be in writing, signed and filed in his office. Ordinary letters bearing the word 'Personal' in connection with the address shall be delivered as other mail for the addressee is delivered.

* * *

4. When a postmaster is in doubt as to the identity of the addressee he may require proof, and shall exercise great care to make proper delivery, especially where mail matter appears to be of value."

The *Postal Regulations*, Section 816, were considered pertinent by the trial court (R. p. 80), and by the Circuit Court of Appeals (R. p. 104). That Regulation is not mentioned in the Petition herein. Its significance lies in assuming valid petitioner's claim that it is within the coverage of the bond in which it is not mentioned nor indicated. That assumption is contrary to the fact, as appears hereafter. But if the assumption be entertained, then this regulation defines petitioner's remedy.

> Sec. 816. The loss, rifling, damage, wrong delivery of, or depredation upon registered or other mail, and the failure to collect or remit C. O. D. funds shall be investigated by the Chief Inspector, who shall ascertain the facts.
>
> 2. When the Chief Inspector finds that the facts ascertained in connection with such an investigation establish the responsibility, by reason of fault or negligence, of a postal employee or mail contractor or an agent or employee thereof, the Chief Inspector shall demand the amount of the loss from such employee or contractor.
>
> * * *
>
> 6. If full recovery is not made and the Chief Inspector determines that further proceedings should be had, he shall present the facts to the Solicitor for the Post Office Department for advice as to the advisability of suit by the United States for recovery of the amount involved. Upon receipt of the reply of the Solicitor the Chief Inspector shall, if he deem proper, prepare the request of the Postmaster General upon the Solicitor of the Treasury for suit.
>
> 7. All amounts recovered under the provisions of this section shall be paid to the United States and to the senders or owners of the mail as their interests shall appear.
>
> 8. If the facts ascertained by the Chief Inspector establish an irregularity for which indemnity may be

payable and recovery can not be made without materially delaying the settlement of the indemnity claim, he shall transmit the papers to the officer charged with consideration of such claims for certification or rejection."

Related *Postal Regulations* provide remedies to the public by Departmental action that cover most of the usual cases of loss through the mishandling of the mails by carelessness or theft of postal employees. The interstices in the Regulations are filled in by Acts of Congress providing for Departmental action. These Regulations with their interpolated statutes were helpful to the Circuit Court of Appeals in its construction of the coverage of this bond (R. p. 106) and to the trial court (R. p. 80). Since they are not mentioned in the Petition herein, they are quoted in the footnote below.*

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*Title 5, U. S. C. A., as amended June 22, 1934. Sec. 392. **Adjustment and settlement of certain claims for damages to person or property by Postmaster General.** When any damage is done to person or property by or through the operation of the Post Office Department in any branch of its service and such damage is found by the Postmaster General upon investigation to be a proper charge against the United States, the Postmaster General is invested with power to adjust and settle any claim for such damage when his award for such damage in any case does not exceed $500, and this authority shall hereafter be construed as extending to cases caused by the negligence of any officer or employee of the Post Office Department or Postal Service acting within the scope of his employment. (Note—Last four lines beginning with words "and this authority"—was added by amendment of June 22, 1934.)

Title 31, U. S. C. A. Sec. 215. **Settlement of claims not exceeding $1,000; certification of amounts found due to Congress; time for presentation.** The head of each department and establishment acting on behalf of the Government of the United States may consider, ascertain, adjust, and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any

There are four suggestions of fact in the Petition that should be qualified if understanding is to be unclouded.

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claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor, together with a brief statement of the character of each claim, the amount claimed, and the amount allowed: **Provided**, That no claim shall be considered by a department or other independent establishment unless presented to it within one year from the date of the accrual of said claim.

Title 39, U. S. C. A.. Sec. 190. **Delivery of stolen money to owner.** Whenever the Postmaster General is satisfied that money or property stolen from the mail, or the proceeds thereof, has been received at the department, he may, upon satisfactory evidence as to the owner, deliver the same to him.

Postal Regulations, Sec. 59 * * *

2. The head of each department and establishment acting on behalf of the Government of the United States may consider, ascertain, adjust, and determine any claim accruing after April 6, 1917, on account of damages to or loss of privately owned property where the amount of the claim does not exceed $1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor, together with a brief statement of the character of each claim, the amount claimed, and the amount allowed: **Provided**, That no claim shall be considered by a department or other independent establishment unless presented to it within one year from the date of the accrual of said claim.

3. Acceptance by any claimant of the amount determined under the provisions of these acts shall be deemed to be in full settlement of such claim against the Government of the United States.

4. (a) Postmasters shall investigate and report to the bureau of the department concerned all the facts concerning accidents of any kind involving instrumentalities of the Post Office Department with a recommendation as to the action that should be taken. If Government property was damaged through the fault of a private party, the postmaster shall collect the amount of such damage, if possible.

(b) Reports on accidents in which persons have been injured or private property has been damaged and reports on other accidents when the advisability of civil suit should be considered, shall be forwarded by the bureau of the department concerned to the Solicitor for review.

(c) The Solicitor shall determine whether or not responsibility rests upon the Government and compensation be allowable under the provi-

(a) The "Summary and Short Statement of the Matter Involved" in the Petition in its first paragraph (p. 2) refers to a "tortious misdelivery" of letters by the postmaster. If the epithet suggests the inference that this action is one in tort, then the petitioner is taking a new position, not suggested below. The case below was summarized by the Circuit Court of Appeals (R. p. 104). Although the Petition (pp. 6, 7) finds fault with some of the Circuit Court of Appeals' statements as to the facts, it finds no fault with this one:

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sions of paragraphs 1 or 2 of this section; but no claim shall be considered unless presented to the department within one year from the date of the accrual of said claim. The Solicitor shall recommend to the Postmaster General the payment of such claims as in his opinion should be paid pursuant to the provisions of paragraph 1 of this section, not exceeding in the aggregate the amount of the appropriation for this purpose. He shall also keep a record of the number of claims submitted, the number rejected, the number approved, the number paid, and the total amount thereof, and of the number approved but not paid because of lack of appropriation, if there be such, and the total amount thereof. He shall also consider and recommend to the Postmaster General the certification of such claims as in his opinion should be recommended for payment under the provisions of paragraph 2 of this section.

(d) When the Solicitor concludes that a civil suit is warranted he shall so advise the Chief Inspector. The Chief Inspector shall then prepare the request of the Postmaster General upon the Solicitor of the Treasury for such suit, and in case of recovery shall arrange for the proper disposition of the proceeds.

Postal Regulations, Sec. 233. All moneys received from mail robbers or other offenders against the postal laws, and moneys recovered by suit, or otherwise, on account of moneys taken from the mail or losses therein, shall be forwarded at once to the Chief Inspector, who shall deposit the same daily with the Superintendent, Division of Finance, office of the Third Assistant Postmaster General.

2. The Chief Inspector shall determine, upon satisfactory evidence, the proper persons or owners to whom the moneys shall be restored, and the Superintendent, Division of Finance, office of the Third Assistant Postmaster General, shall make payments in accordance with the schedule furnished and approved by the Chief Inspector, under the authorization of the Postmaster General.

"It will be observed that this is *not* an action against the postmaster *sounding in tort* * * *. It is an action on a bond by a stranger to the contract brought without the consent of the obligee." (Italics ours.)

(b) The Petition (pp. 6, 7) undertakes to correct the Circuit Court of Appeals' statement of fact that there was no claim below that the postmaster "had knowledge of the fraud that was being perpetrated" by the forger. The petitioner, to effect this correction, argues negatively from the possibility of a jury finding without citation to the evidence or to the court's instruction which define the verdict. Neither verdict nor evidence was for consideration either by the Circuit Court of Appeals or by the District Court upon the granted motion to dismiss from which the petitioner's appeal

3. When any money, either coin, currency, or negotiable paper, is received at the Post Office Department, a list shall be prepared by the bureau or office to which it pertains on Form 3033 in triplicate, the lists to be numbered consecutively through each fiscal year commencing with No. 1 on July 1 of each year, and transmitted with the funds to the Superintendent of the Division of Finance. The form shall show the name of the bureau or office, date funds were received, case number, name of remitter, purpose and fund to be credited whenever possible, and amount, except those from the office of the Chief Inspector, which shall have attached statements on Form 550 submitted by the inspectors in charge and shall show a summary of the classes of funds and the amount of each. The superintendent shall verify the amount received with the amount as shown on the schedule, sign the triplicate as the receipt to the bureau or office, and retain the original and duplicate. At the close of each month the superintendent shall total the original schedules by bureaus or offices and enter the amount on Form 3034 prepared in triplicate. The amount of uncollectible checks, if any, shall be entered in the space provided for that purpose on the form. This form properly filled out shall be sent to each bureau or office from which funds are received whether any funds were received during the month or not. Each bureau or office shall have the amounts as stated on Form 3034 verified with their records, and if the amounts agree the duplicate shall be retained and the original and triplicate signed and returned to the superintendent.

arose. The motion was made prior to the jury's retiring (R. p. 61), ruling on it was reserved (R. p. 63), it was renewed based on the complaint of the plaintiff (R. p. 65), and was then granted (R. p. 67). The motions had been made in another form prior to trial (R. p. 26) and at the beginning of trial (R. p. 48) and ruling by the trial court deferred (R. p. 53). It is therefore apparent that the suggested inferences from verdict are out of place, and are not made in order to aid consideration on the merits of the case.

Apart from that, in the absence of citation to the Record by petitioner the statement of the Circuit Court of Appeals should be taken as true. Moreover, the record (R. p. 16) shows that plaintiff's complaint fell far short of the explicit specification required to charge a purposeful fraud. It shows (R. p. 47) that upon trial petitioner refused, when challenged, to charge the postmaster with an intended fraud. All that petitioner now claims is that there *might* have been circumstantial evidence on which the jury *might* have found it. The instructions of the trial court to the jury do not appear in the Record, so we refrain from quoting them in refutation.

(c) The petition (p. 2) states that this is an action "to recover damages" sustained by misdelivery of the mail. The Circuit Court of Appeals (R. p. 102) correctly said it is an action "to recover *consequential* damages" resulting from a misdelivery. The distinction is important, because it is one difference between this case and the case of *Howard v. U. S.*, 184 U. S. 676. The *Howard* case is the substantial basis of plaintiff's petition for certiorari (Petition, p. 11). If it be distinguishable there is no conflict between this decision of the Circuit Court of Appeals and the decision of any other court in any other case. The point is,—that the petitioner is not suing for the intrinsic value of mail misde-

livered. It is suing for the losses it says a forger inflicted on it by taking advantage of the misdelivery (Complaint, R. p. 17). The Petition should in the interest of accuracy follow the example of the Circuit Court of Appeals and characterize the action as one for "consequential damages",—sustained through a dubious chain of alleged consequences.

(d) The Petition (pp. 10, 18, 25) asserts that no one else,—either the United States or another mail user,—has any claim against the bond here in suit. To support that repeated statement of fact, upon which argument is based (Petition, p. 25) the petitioner gives no citation to the Record. The purported supporting reference to page 84 of the Record does not sustain the claim. Since there is nothing whatever on the point in the Record we are also unable to give a citation. The fact is, nothing in the Record shows one way or the other whether the United States or others have, have had, or may have, claims against this bond which the petitioner seeks to exhaust for itself and by itself.

With these supplements to applicable statutes and regulations, and these qualifications of stated pertinent facts, the petitioner's statement may, for the purposes of this application only, be taken as true.

## II.

## ARGUMENT.

The rules mention several conditions of fact which may move this Court to grant certiorari. The petitioner detects and argues all of them (Petition, pp. 11-13). The occasions must be rare when a Circuit Court of Appeals, as well as a District Court, in a case of general law,—the construction of a contract,—are wrong on all possible grounds.

The writ is invoked on two general suggestions. They are that an important question of federal law remains undecided, and the conflict of this decision with other decisions of this Court and of other courts. The claimed conflict is not said to be direct, but is said to be a conflict between this decision and what petitioner conceives to be the implications or logical consequences of other decisions (Petition, pp. 11, 19, 26, 29). Thus the fact of conflict must depend as much on petitioner's logical processes as it does on any decision.

### A. Important Question of Federal Law.

The Petition suggests that the importance of the question whether a private mail user may, without the consent of the obligee, the United States, sue on a postmaster's bond is obvious (Petition, p. 11). It has heretofore never been obvious to anyone else. The petition suggests that apart from what the petitioner conceives to be the analogous case of a different kind of Federal officer, there is no decision of any Federal Court upon the point (Petition, p. 11) and only the decisions of two State courts upon it,—both of them adverse to the petitioner. In the 150 years of operation of the Postal establishment, there must have been millions of instances of misdelivered mail. Some thousands of these in-

stances must have entailed some consequential loss to the sender. Yet never before has litigation like this ensued in any Federal Court. Nor, if petitioner's distinctions on pages 20 and 21 of his Petition be sound, in any court of the country. There has been no public interest in the question presented. The important question of Federal law that is said to cry for decision has never been invoked in the countless instances in 150 years in which it might have been. This shows that there is neither an important question of Federal law involved, nor any public interest in the point. It shows more. It shows that there is no right to sue such as the plaintiff claims. *Western Union Telegraph Co. v. Schriver*, 141 Fed. 538, Sanborn, J.:

> "The absence of reported judgments and decisions sustaining an alleged liability under a given state of facts raises a strong presumption that no such liability exists." (Syllabus, p. 539).

The reason for this apathy and absence of decision is that a complete remedy is provided those persons who may be so damaged by processes other than by suit. The Postal Regulations, Section 816 (above quoted, page 4) provide for suit by the United States through its proper officers upon the bonds of postmasters and for distribution of the proceeds of suit among the persons who have been hurt by the Postal employee's misconduct. Of course the claim of the United States, the obligee of the bond, is first satisfied. This process prevents exhaustion of the bond, to the exclusion of its obligee, the United States, and to the exclusion of all others, by the first casual adventurer who rushes in and usurps the name of the United States and seizes the fund. It leaves recoveries on bonds running to the United States for misconduct or fault of the employee within the control of the author-

ity which requires the bond and prescribes its amount and defines its conditions. This Regulation fits in with other Postal Regulations and Acts of Congress to "protect the public against the usual and normal losses that may occur on account of carelessness in the handling of the mails or otherwise" (R. p. 80, supra, p. 5-9). It provides remedies by administrative action within the Department and under its control. The fact that statutes fill in the interstices of the Regulations to make a consistent whole which provides remedies for every foreseeable case shows that Congress knew the Regulations the body of which it filled out by statute. By supplementing them it approved of them. This disposes of the suggested argument on page 26 of the Petition, to the effect that the Regulations are unauthorized by Act of Congress. These Regulations are not inconsistent with the Acts of Congress providing that postal bonds, such as here in suit, shall run to the United States (5 U. S. C. A., Sec. 377), and that all suits arising under the Postal laws shall be brought in the name of (i. e., by) the United States (28 U. S. C. A., Section 732). The remedy thus provided by Sec. 816 is the exclusive one.

*U. S. v. U. S. F. & G. Co.*, 247 Fed. 16 (C. C. A. 6, 1918) (cited in Petition, p. 33).

*Globe Newspaper Co. v. Walker*, 210 U. S. 356.

*Union Pacific R. R. v. U. S.*, 219 Fed. 427 (C. C. A. 8, 1915).

*U. S. v. Atlantic Coast Line R. R.*, 215 Fed. 56 (C. C. A. 4, 1914) (cited in Petition, p. 31).

Consideration of these remedial regulations and statutes and the exclusive nature of the remedies they furnish within the Postal Department makes apparent the reason for the dearth of litigated cases on this point. The United States fre-

quently sued, and recovered, on postal bonds and distributed the proceeds of the suit by administrative processes (Regulations, Section 816) to the user of the mails who was damaged. Below are cited some such cases, all of them cited in the petition, pages 30-33:

*U. S. v. American Surety Co.*, 163 Fed. 228 (C. C. A. 4).

*Gibson v. U. S.*, 208 Fed. 534 (C. C. A. 1).

*U. S. F. & G. Co. v. U. S.*, 246 Fed. 433 (C. C. A. 9).

*U. S. v. Atlantic Coast Line R. R.*, 215 Fed. 56 (C. C. A. 4).

*Massachusetts Bond & Ins. Co. v. U. S.*, 54 Fed. (2d) 1039 (C. C. A. 7).

*U. S. v. U. S. F. & G Co.*, 247 Fed. 16 (C. C. A. 6).

*National Surety Co. v. U. S.*, 129 Fed 70 (C. C. A. 8).

These regulations and statutes are the exclusive remedy for petitioner if he be assumed to be within the coverage of the bond. The cited cases are instances, selected by the petitioner himself, of many cases illustrating the zeal with which the Postal Department sues on bonds for the benefit of mail users, safeguarding first the rights of the obligee, the United States, in the bond that was made with it. This accounts for the absence of litigation on the point of which the Petition speaks (pp. 11, 19, 20, 22). The question of Federal law involved in this case is thus seen to be important only if Federal remedial statutes and regulations,—relied on by the courts below and omitted from the Petition,—are to be considered as nonexistent. The great public disinterest in the question presented is accounted for by the other ample and simple and costless remedy, which the petitioner disregards.

Of course the ascertainment of the coverage of this bond involves no question peculiarly federal or important, any

more than does ascertaining the coverage of any other official or statutory bond,— a sheriff's, a country treasurer's, a bank teller's, or a materialman's.

Of course if there be any good reason why users of the mail should be permitted to sue on postmasters' bonds, those reasons should be addressed to the Postmaster General or to the Congress,—who may fix the conditions of future bonds to permit such suits and who may fix future premiums. That is a better method than by appending to the thousands of existing bonds with private and corporate bondsmen a construction not dreamed of when the contracts were made,— not dreamed of either by the Postoffice Department (see Regulations 816) or by the Attorney General who caused to be filed a brief *amicus curiae* adverse to petitioner (R. pp. 53, 54), or by the postmaster who looked only to his Departmental superiors, or by the bondsmen.

## B. Conflicts With Other Decisions.

(a) *Conflicts With the Decisions of this Court.*

It is claimed that this decision conflicts with the decisions of this Court (Petition, p. 12). The cases said to be in conflict we consider in order inverse to that of the Petition.

*New Jersey Steam Navigation Co. v. Boston Merchants Bank*, 6 How. 344, was a suit by a bailor against a third person upon a contract with the bailee relating to the bailed property. This is a suit on a bond given an obligee named by statute, brought by a stranger to the bond, not in privity with the obligee, and without the consent of the obligee. The recovery sought here is not bailed goods, but is consequential damages from the loss of letters of no intrinsic value. There is no conflict.

"*Smith v. U. S.*, 170 U. S. 372 * * * holds that fair protection of those dealing with a Government official should not be defeated through any 'refined reasoning'" (Petition, p. 12). The decision here in question holds that strangers to contracts made with the United States may not sue upon them without the consent of the United States. It holds that bonds given the United States may not be exhausted by bold adventurers. It holds that fair protection of those dealing with postmasters is afforded by administrative remedies which plaintiff has not pursued. There is no conflict.

"*Crooks v. Harrelson*, 282 U. S. 55 * * * holds that the letter of an Act of Congress is controlling unless a contrary intention is plainly manifested" (Petition, p. 12). The decision here in question holds that the letter of the Act of Congress naming the United States as obligee of the bond (5 U. S. C. A., Section 377) and that the letter of the Act of Congress requiring the United States alone to sue in all cases arising under the Postal laws (*28 U. S. C. A., Section 732*) and that the letter of the statutory bond, "to pay to the United States of America" (R. p. 19) are controlling, and exclude this petitioner. The petitioner points to no contrary manifestation in any statute, regulation or language of the bond. There is no conflict.

"*Teal v. Felton*, 12 How. 284 * * * holds that a postmaster's wrongful withholding of mail matter from the addressee is a conversion for which the addressee can sue the postmaster" (Petition, p. 12). The suit here in question is not by the addressee, it is by the sender. It is not for a conversion of the property in a letter, but for consequential damages arising from misdelivery. It is not, as here presented, against the postmaster, but against a surety to the

United States and without consent of the United States on a bond to which petitioner is a stranger. There is no conflict.

"*Howard v. U. S.*, 184 U. S. 676 * * * holds that an official bond of a Federal Court clerk, given under a * * * statute * * * could be sued on by a private person in the name of the United States, although the United States was the only obligee named in the bond" (Petition, p. 12, argumentative parts omitted). Petitioner's case depends on this *Howard* case (Petition, pp. 11, 23, 29, 34). If the statutes requiring bonds, and the bonds, of Federal Circuit Court clerks be different from the statutes and regulations prescribing bonds of postmasters, and prescribing suits on them and remedies under them, or if the bonds be different, then plaintiff's case is gone (Petition, p. 11). The Circuit Court of Appeals (R. p. 105-6) and the trial court (R. pp. 77-80) thought the cases very different. Their distinctions of that case from this one are adequate. We shall, however, draw attention to the facts of the *Howard* case in some detail and to its more flagrant differences from this one.

A preliminary reminder of the state of the law will make the holding of the *Howard* case clear. As to official bonds,—"No person who is not the obligee of a bond or its assignee can put it in suit unless authorized to do so by the legislature. It is not enough that a breach of the bond has damnified the person who brings the suit. * * * No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent, given in fact, or by legal intendment." (Marshall, C. J., in *Washington v. Young*, 10 Wheat. (23 U. S.) 406). Although third persons to such

bonds "may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names (citing cases) * * * every citizen * * * is interested in the faithful performance of contracts of service by policemen, firemen and *mail contractors* * * *. But for the breaches of their contracts *the citizen cannot sue,—though he suffer loss because the carrier delayed in hauling the mail,* or the policeman failed to walk his beat * * * "(*German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220). (Italics ours.)

"Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must at least show that it was intended for his direct benefit" (Holmes, J., quoting, in *Robbins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303).

This being the law, it will be borne in mind that in the *Howard* case the search of the court was for a "legal intendment" (in the language of the *Young* case), apparent from the statutes and their circumstances, that private persons might sue on that bond of that clerk in the name of the United States.

In the *Howard* case (184 U. S. 676) the bond covered a clerk of the Circuit Court of the United States who had embezzled money paid into court by a litigant, pursuant to order of the Court. The bond named the United States as obligee. It was given pursuant to a statute that required the Court to fix its amount, to designate its place of deposit, and to supplant it when that seemed desirable. The statutory condition of the bond was that the clerk would faithfully

discharge the duties of his office and "seasonably to record the decrees, judgments and determinations of the court of which he is clerk". Suit was brought on the bond by the person whose payment into court the clerk had embezzled after that person had received leave of that court to sue upon it (p. 679). The Supreme Court reviewed in detail the statute requiring such bond of the clerk. It pointed out, as did the opinion below in that case, that since the great mass of the litigation in the Circuit Court was between private litigants, the Government cases being usually in the District Court, there was very little interest of the Government to protect by bond. (93 Fed. 719, 721.) It then pointed out that the condition of the bond seasonably to record the decrees must be taken as referring to the private litigants who were the majority in that court and without other security. The Court then considered that the bond was for the protection of all suitors and that the statutory provision for an increase in the amount of the bond was for the protection of private as well as public suitors. The Court pointed out that a contrary reading of the statute and of the bond would leave private suitors in the Federal Court without any provision *whatever* for their security. The Court then distinguished the *Young* case, above quoted, affirming it to be sound law, and pointed out that in that case the primary purpose of the bond was the protection of the public as the obligee. The Court said that the Circuit Court with whom the bond was deposited must be regarded as trustee of it for any party injured. The Court then held that a private litigant, whose money was so embezzled might sue upon the bond because "such must be held to be the legal intendment of *existing statutory provisions*" (Italics ours). In respect of the argument that bonds other than those of clerks of Federal Courts expressly provide for suit by private persons, it said:

"We are of opinion that this argument, though not without force, ought not to prevail against the legal intendment of *the statutory provisions* relating to clerks, who hold a *peculiar relation* to the courts appointing them, as well as to the public." (Italics ours.)

It is notable (a) that the Supreme Court in distinguishing the *Young* case looked to the primary purpose of the bonds in each case, as did the Circuit Court of Appeals here, and (b) that the Supreme Court looked for legal intendments of coverage only in applicable "statutory provisions". The only immediately applicable "statutory provisions" here require the bond to be made "to and with the United States" and suit only "in the name of the United States". The only collaterally applicable "statutory provisions" leave the liabilities of the bond completely within control of the United States (Record, pp. 75 and 76).

Another striking distinction between the *Howard* case and the case at bar is this: In the *Howard* case the court found, in the language of the bond, and in a search of the statutes, and in the circumstances of the bond, a legal intendment from "statutory provisions" that that plaintiff might recover on the bond. In the case at bar the petitioner has not referred to any language of the bond, to any statute, to any regulation, or to any circumstance which indicates that the bond was intended for the benefit of anyone other than the United States, its statutory obligee. The cases cannot be considered in conflict unless they be analogous. They cannot be considered analogous unless some elements of the analogue be pointed out. No such element is mentioned or can be.

In the *Howard case the* Circuit Court was the depositary of the bond, authorized to prescribe its amount and, as the

Supreme Court said, was the "trustee" of it. It was, in effect, the obligee. It gave its consent to the plaintiff's suit. In the case at bar the United States was the obligee. Not only was its consent refused to plaintiff (R. p. 59), but the United States filed a brief *amicus curiae* in support of the position that the plaintiff has no right to bring this action on this bond (R. pp. 54, 84).

In the *Howard* case the reference in the bond to the decrees that were to be faithfully recorded must obviously have been decrees of private litigants, since the great mass of litigation in that Court is private, and not that of the United States. There is no reference to any duty to any private person in the statute or bond in the case at bar. In the case at bar the condition of the bond is that the postmaster will faithfully discharge all duties and trusts imposed upon him and "that he shall perform all *duties as fiscal agent of the Government* imposed upon him", and "shall also perform *all duties* * * * imposed upon * * * him * * * in connection with the *Postal Savings System*". The obvious purpose of this condition is to protect a primary interest of the Government. If it were intended to be read as petitioner claims, then the last two of its three conditions would be unnecessary. If plaintiff's contention is correct, the condition that the postmaster will perform all duties imposed by law or regulation is sufficient and the specified particular duties to the United States are surplusage. The specifications of the performance of duties as fiscal agent and in connection with the Postal Savings System show that the purpose was the protection of the United States, the named obligee.

In the *Howard* case it was pointed out that there is no provision in any statute pertaining to the bond inconsistent

with a direct duty to the private litigant. In the case at bar, the statutory provisions (Title 39, USCA, Sec. 35, 36, 37, 38, 44, Record, pp. 75, 76), relating to the application of payments made by sureties upon debts to the Government, and to the period of liability on bonds, and to the safe-keeping of the public property at the postoffice, are inconsistent with a private coverage. The statutory provisions release the surety after three years by nonaction of the Postmaster General without reference to claims of others (Title 39 USCA, Sec. 40, Record, pp. 75, 76). These are all inconsistent with any duty to the private user of the mails in respect to the bond. In the *Howard* case it was forcefully pointed out that apart from this bond private litigants have no security whatever. In the case at bar, it is abundantly apparent from Sec. 816 of the Postal Regulations that the private user of the mails has ample protection under this bond, even if it be assumed to be for his benefit, by pursuing his administrative remedy. The language of the *Howard* case referring to the "peculiar relations" of the Clerk of the Court to private litigants means that that case was not intended to be taken as precedent in the cases of other officers. Each such case must stand upon its own facts and statutes. The petitioner, neither in the Petition nor at any time below, has pointed to any statute, or regulation, or other circumstance which would in any like way in this case show legal intendment that private persons might sue upon it.

In the *Howard* case a legal intendment was found as respects the private litigant whose money was embezzled. In the case at bar there is the very practical difference that the postmaster is necessarily unaware of the contents of the mail that he handles. The clerk of court knew that he had money that he held and that was not his. The postmaster is

sued here on his bond, not for the value of what he handled but for consequences arising by reason of other circumstances out of a misdelivery of it. The legal intendment in such a case would necessarily have to be much clearer than in the *Howard* case. Here the recovery sought is not that of any *tangible* property. To hold a postmaster to the same measure of liability as the clerk in the *Howard* case, who received money, is to extend the "peculiar relation" spelled out by the court from the statutes in the *Howard* case far beyond the narrow limits there expressed.

(b) *Conflicts with the decisions of other Circuit Courts of Appeal.*

The Petition suggests that this decision conflicts with seven decisions of other Circuit Courts of Appeal and with one opinion of an attorney general. These cases and opinion are cited at the top of page 13 of the Petition. In each of the cases cited there was a bond in which the United States was obligee; in each of those cases the United States sued upon that bond. In the case at bar the United States is not suing, but is taking a position adverse to the plaintiff. No one has ever suggested that the United States might not sue upon this bond, and perhaps it will. Cases where the obligee of the bond sued upon it are not in point here. There is no conflict between the decision in this case, which holds that a stranger to a bond may not sue upon it, and the decisions cited in other Circuit Courts of Appeal, which hold that the obligee may sue.

Of the seven cases from other Circuit Courts of Appeal cited as establishing a conflict with the decision in this case the following were suits upon postal bonds brought by the

United States, which in each instance was the obligee of the bond:

*United States v. American Surety Co.*, 163 Fed. 228;
*Gibson v. United States*, 208 Fed. 534;
*United States F. & G. Co. v. United States*, 246 Fed. 433;
*Massachusetts Bonding & Ins. Co. v. United States*, 54 Fed. (2d) 1039;
*United States v. United States F. & G. Co.*, 247 Fed. 16;
*American Surety Co. v. United States*, 133 Fed. 1019.

In those cases where the United States, as distinguished from the mail users, sued upon the bond it was held that the United States might recover not only its own proper loss but the loss of the private user of the mails, and that the United States was under a moral obligation to pay over to that private user such loss as it had recovered on account of him. Sec. 816 of the Postal Regulations is a recognition of this moral obligation of the United States to pay over to persons damnified by postal errors such recovery as the United States might make on their account. That section, above quoted page 4, provides the machinery by which the United States carries out the doctrine of these cases cited by the petitioner. As appears from the quotation from *United States v. United States F. & G. Co.*, on page 33 of the Petition, this right of recovery of the United States is based upon its unique relationship to the bond and to the public which uses the postoffices. It is in its function as *parens patriae* that it sues upon the bond, and distributes according to Sec. 816 of the Postal Regulations the proceeds of the bond among the various claimants in the proportion to which they are entitled and as far as the funds allow. In each case the court speaks of a *moral* obligation of the

United States to pay proceeds of the bonds to the mail user. This is an affirmation that there is no *legal* right in the private mail user—that is, that the private mail is not within the coverage of the bond. There can be no conflict between these cases, in which the named obligee of the bond, the United States, sued, and the case at bar, in which it is held that one who is not the obligee may not sue.

The remaining case cited by the Petition from another circuit as in conflict with the decision in the case at bar is *United States v. Abeel*, (C. C. A. 5) 174 Fed. 12. That was the case of a bond of a clerk of the federal court. The obligee named was the United States. The United States sued upon the bond. It appears from the statement of the case on pages 32 and 33 of the Petition and from the foregoing that there is no conflict between that case, where the obligee of the bond—the United States—sued upon it, and the case at bar, in which it was held that one not the obligee of the bond might not sue without the consent of the obligee.

The remaining reference to establish a conflict between the decision in the case at bar with those of other circuits is the citation of 23 *Opinions, Attorney General*, 476, 479 (Petition, p. 33). A conflict of a decision of a Circuit Court of Appeals with a prior opinion of some attorney general is not a ground for issuance of the writ of certiorari. We have not available the opinions of the attorneys general and it is not clear to us from the quotation from the opinion in the Petition (pp. 33, 34) what kind of a bond the Attorney General giving the opinion was referring to, nor the conditions of the bond. Apparently the petitioner in quoting from the opinion was itself in doubt concerning the nature of that bond and its conditions ("*seems* to have had under consideration the bond of a postal employe *resembling* in its conditions the

bond at bar", Petition, p. 33). There is nothing in the quoted portion of the opinion to indicate that one not the obligee in the bond or the proprietor of the obligation may put it in suit without the consent of the obligee. Whatever the effect of that opinion may be, it is entirely dissipated by the fact that in the case at bar the Attorney General caused a District Attorney of the United States to file a brief as *amicus curiae* adverse to the contention of the plaintiff and petitibner. If there were anything in the opinion of the Attorney General cited by the petitioner that may be taken as supporting his case, it must be presumed to have been, upon more mature consideration, revoked by the brief filed as *amicus curiae* by the United States in this case (R. p. 84).

(c) *Conflict with other decisions of same Court.*

It is suggested in the Petition on pages 13 and 34 and 35 that the decision of the Eighth Circuit Court of Appeals in this case conflicts with other decisions of the same court. Three cases are cited by petitioner as establishing this conflict. They are considered below.

The first of the cases is *Bosler v. United States*, 26 Fed. (2d) 4. That was an action upon a bond given a depository in bankruptcy pursuant to the statute quoted on page 7 of that opinion. The bond ran to the United States. The further statute quoted on the page (Title 11 USCA, Sec. 78, subsection H) provided:

> "Bonds of * * * designated depositories * * * may be sued upon in the name of the United States for the use of any person injured by a breach of the conditions."

The suit in question was brought by the United States pursuant to the statute. The opinion on page 7 shows that the

suit was brought for the use of numerous persons injured by a breach of the bond. The court quite properly held that the United States, the obligee of the bond, thereto expressly authorized by the statute mentioned, might maintain a suit upon the bond. There can be no conflict between the decision in that case and the decision in the case at bar. The decision in the case at bar is that a stranger to the bond, of which the United States is the obligee, may not, without the consent of the United States, sue upon that bond in the absence of any statute creating a legal intendment that he shall be permitted to do so. Again, the absence of reference by the petitioner to any fact, circumstance, statute, or regulation carrying any remote inference of intention that a private person may sue upon this bond is significant.

The second of the cases cited by the petitioner as establishing this conflict is *Howard v. United States,* 102 Fed. 77. This is the same *Howard* case that was above discussed. The citation is to the decision of the Circuit Court affirmed in 184 U. S. 676. The distinction between that case and the case at bar is above discussed (supra, p. 17-22) and is carefully pointed out by the trial court on pages 77 to 80 of the Record. The distinction is further pointed out by the very Circuit Court of Appeals mentioned on page 105-6 of the Record.

The third case depended upon by the petitioner to establish this conflict is *National Surety Co. vs. United States,* 129 Fed. 70. That was a suit upon the bond of a letter carrier, which bond was given to the United States as obligee. The letter carrier rifled the mail of registered letters for which the United States was liable over in small amounts to the owner. The decision held that the United States might sue upon the bond for the value of the matter stolen above

the amount of its liability over to the mail user. This again is an example of a suit by the United States as obligee of a bond for distribution of its proceeds pursuant to Sec. 816 of the Regulations. By that regulation the United States sues upon the bond and pays over the loss that the mail user may establish, which does not exhaust the bond to the prejudice of the United States or other damnified users of the mail. There is no conflict between the decision in that case, which holds that the United States, the obligee of the bond, may sue upon it, and the decision in the case at bar, which holds that a stranger to the bond may not sue upon it without the consent of the obligee, the United States.

### C. Rejoinder to the Petition.

The petitioner points to no statute or regulation affording ground for the inference that there was a legislative intendment that he might sue upon this bond which the congress required to run to the United States.

He merely attempts to expand into a general principle the narrow comparisons of numerous statutes and circumstances which the *Howard* case described as creating a "peculiar relation". He then suggests that a decision in this case could be so framed as to avoid its being regarded as a precedent (Petition, p. 25). The *Howard* case was so framed.

Herein-below are mentioned briefly five considerations with their corollaries which establish that no legislative intendment existed here to permit such a suit.

There are also briefly mentioned four cases with their corollaries, which, if there be virtue in analogy, establish the soundness of the decision assailed. They make it clear that this decision is but one of many repeated applications of a well known principle of general law.

The Act of Congress requires that a bond be made to and with the United States (supra, p. 13). This express provision as a separate section of the statutes indicates that the Congress intended that the United States should have complete control of this bond.

The Act of Congress requires that suits under the Postal Laws as well as suits for duties, imposts and other such matters shall be brought in the name of the United States. The language covers this case. It evinces an intention that the responsible officers of government shall be in the control of the litigation of all such cases. It cannot be said that that intention is discharged when, against the will and without the consent of the United States, a private corporation takes the name of the United States. The intention of that statute is that funds so recovered shall be paid into the United States Treasury and thence by the United States disbursed in such manner as it determines. It was said with reference to this very statute in the case of *The Stella B*, 183 Fed. 507, 512:

> "But a general penalty provided by a law of Congress and not particularly specifying that the penalty shall go to somebody else must carry with it the payment of the penalty into the treasury of the United States. Its subsequent disposal or whether someone may be entitled thereto at the hands of the United States cannot affect the form of action under which the penalty should be sought to be recovered."

No distinction may be drawn between the language of that statute respecting the recovery of penalties and that respecting suits arising under the Postal Laws. If this suit may be maintained in this form, any private individual may usurp the name of the United States and bring suits for duties or imports or penalties. A private individual may not sue un-

der this statute for the benefit of himself and of United States. *Williams v. Wells Fargo Express Co.*, 177 Fed. 352, 355. If a private person may avoid the effect of this statute by taking the name of the United States without its consent and designating it as plaintiff to be bound by a judgment, simply on the theory that he is, as a member of the public, the beneficiary of some statute, then he may do so in any case where the United States may sue, e. g., *quo warranto*.

Sec. 816 of the Postal Regulations furnishes an ample and complete remedy to mail users who are within the intendments of postal bonds. It has been repeatedly pursued and suits have been brought under it in many instances by the United States for their benefit. The cases cited in the Petition show this. It is consistent with the purpose of the foregoing statute that all such suits shall be within the control of the Government and of its responsible officers, who shall determine their bringing and their disposition. To provide otherwise would establish a double rule of conduct for the employees of the Government. One rule would be that established by their superiors and the determination of responsible officers in particular cases of alleged misconduct. The other rule would be that made in different cases by a common law jury, ill-informed as to the necessities of administration, the applicable regulations, and the practices of the Department in question.

In its failure to express an intendment that persons such as the plaintiff might sue upon this bond, it must be taken that the Congress had in mind that Sec. 816 of the Regulations will prevent exhaustion of the bond to the detriment of the Government and its claims, and to the detriment of other users of the mail. In the language of *Washington vs. Young*, 10 Wheat. (23 U. S.) 406,

"It should not be in the power of the first bold adventurer who should seize and sue upon it to appropriate it to its own use and to force the obligees to appear in court as plaintiffs against their own will."

No Congress having in mind the necessities of administration of a far flung postal department would extend the liability of postmasters to that here claimed by the petitioner. The postmaster is without knowledge of the contents or purpose of letters received at the postoffice, whether they be addressed to a person known or unknown to him. He is not in the same position as a man who receives delivery of property the nature and character of which is apparent at delivery, and is in no way concealed or held from his scrutiny. The postmaster has no way of knowing that there are possible damages resulting from his negligence or failure properly to deliver the letter. They are not only beyond the bounds of foresight but beyond those of imagination. A mislaying of a circular advertisement may provoke a suit for the loss of a sale. Just as here, where it is claimed that the erroneous delivery of circular inquiries addressed to strangers by the sender enabled a forger to seize his opportunity, so any letter of the millions handled daily might entail enormous and incalculable consequential damages. It is perfectly obvious why the Congress expressed no intention that such persons as the plaintiff might sue such postmasters, either personally or upon such bonds,—but on the contrary, required such bonds to be to, and such suits to be by, the United States.

The case of *Washington v. Young* has been above mentioned and is still law. This bond must be read as if made in the City of Washington and is subject to the common

law of the District of Columbia. *Tullock v. Mulvane*, 184 U. S. 497, 514; *Cox v. United States*, 6 Peters 172:

> "The bond is, therefore, in every point of view in which it can be considered, a contract to be executed at the City of Washington, and the liability of the parties must be governed by the rules of the common law."

The *Young* case above cited is still the law in the District of Columbia. *District of Columbia to the use of Langellotti v. Fidelity & Deposit Co. of Maryland* (Ct. App., Dist. of Columbia, 1921), 271 Fed. 383.

It will be noted that the *Young* case holds that no one other than the obligee may sue upon a bond unless the right be given by the legislature. The reference to "legal intendment" is to using the name of another without assent. So here, while the Congress has provided in numerous cases that private persons may sue upon a bond running to the United States—such as materialmen under public contract, bonds of bankruptcy trustees, bankruptcy receivers, bankruptcy depositaries, bonds of United States marshals, cartage contractors, and of consular officers, and of many other persons—the absence of such provision entailing such consequence in this case is of decisive weight.

The case of *German Alliance Ins. Co. v. Home Owners Supply Co.*, 226 U. S. 220, illustrates the reason for the rule that only parties to a contract may sue upon it and the impossibility of any man knowing his liability were the rule otherwise. There a subrogated fire insurance company sued a water company for its failure to perform a contract with a city to furnish ample water for use in fires. This Court denied recovery and pointed out that even in those jurisdictions where the right to sue on contracts of others is most

liberally granted such a suit cannot be maintained unless it be shown that the contract in question was intended for the *direct* benefit of the plaintiff. To illustrate the unbounded nature of liability were the rule to be otherwise, the Court used as an illustration, which it apparently considered too clear for argument, the very case at bar. It said that the citizen may not sue a mail contractor for a breach of his contract though the citizen suffer loss because the carrier delayed in carrying the mail. That illustration is this case.

*Munroe v. Raphael*, 288 U. S. 485, is another illustration of the fact that the *Young* case is still the law of this Court. In that case a receiver appointed by the United States District Court sold certain property to a purchaser who agreed to pay a certain percentage of all allowed claims. The purchaser gave a bond running to the United States for the performance of the purchase agreement. The plaintiff by leave of the court sued the surety on the bond in the state court in the name of the United States on his own relation. The District Court revoked its permission to so sue. The Circuit Court of Appeals reversed the action of the District Court. The Supreme Court reversed the Circuit Court of Appeals and re-established the revocation of the District Court, saying:

> "In parting with the property the receiver, as the court's representative, took a bond, running not to the creditors, but to the United States. Certainly no creditor could bring a suit in his own name on the bond for his share of the purchase money."

That bond was much more obviously for the direct benefit of designated third persons than can be claimed for the bond in the case at bar, which specifically covers the postmaster's

duties as fiscal agent of the Government. If there be virtue in analogy or precedent, *Munroe v. Raphael* disposes of the plaintiff's case.

That the question presented is one merely of general law and not of peculiarly federal law which might sanction the issuance of a writ of certiorari is illustrated by the case of *Fosmire v. National Surety Company*, 127 N. E. 472 (N. Y. 1920). That was a bond given by a highway contractor under the New York Highway Law, conditioned for performance and completion of a contract within a prescribed time and for the protection of the state against excess costs and for the payment of wages to laborers. A laborer sued upon it for unpaid wages due himself and his fellows. It will be noted that his position with respect to the bond is much stronger than is the case of the plaintiff at bar, who is not mentioned in the bond or in the statute requiring it. The court held that he might not sue upon the bond since he was not within its statutory intendment. Cardozo, J. in the opinion said:

> "We think the cause of action is in favor of the people solely (citing cases). In so holding we put our decision upon the single ground that the bond, read in its entirety, is inconsistent with the intention that the plaintiff and others in like position should have the right to sue upon it. If that intention is absent, the right to sue will be denied."

So, here, the statutes requiring the obligee to be the United States, putting the right of suit in the United States, placing in the Postmaster General the right to fix the amount of the bond, to supplant it, to change it, and to discharge liability under it, together with other and ample provision for the protection of the users of the mails, are inconsistent with the

right of the plaintiff to sue without the consent of the United States. So are the provisions of the bond protecting the United States against misconduct of its "fiscal agent" and the custodian of its Postal Savings money.

Unless the *Howard* case is to be extended beyond its "peculiar relation," the plaintiff has no case. Even if it be so extended, the provisions of the statute limiting the jurisdiction of the District Court in suits arising under the postal laws must still be met, and the effect of statutory sanction of provided administrative remedies making them the exclusive remedy, must still be met. The petition concedes that apart from the inferential application of the *Howard* case there is no other federal decision upon the point. There therefore can be no conflict between decisions.

The question is one of general law distinguished from a question of law peculiarly federal. This is shown by the *Fosmire*, the *Young*, the *German Alliance*, and the *Munroe* cases, all of which refer in their respective constructions of obligations to the well known rules of general law.

No ground, therefore, appears for the issuance of the writ.

Respectfully submitted,

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